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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1301

STATE OF LOUISIANA,
Petitioner,

versus

JOHN ERNEST BIRABENT,
Respondent.

Petition for Writ of Certiorari to the
Supreme Court of the State of Louisiana

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA

BARBARA RUTLEDGE
ASSISTANT ATTORNEY GENERAL
STATE OF LOUISIANA

LEANDER H. PEREZ, JR.
DISTRICT ATTORNEY
PARISH OF ST. BERNARD

ABBOTT J. REEVES, ESQ.,
DIRECTOR RESEARCH
AND APPEALS DIVISION

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The State of Louisiana requests that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Louisiana entered in the above entitled case December 2, 1974, rehearing denied January 17, 1975.

OPINIONS BELOW

The opinions and judgments of the Louisiana State Supreme Court appear at Appendices A and B. The opinion of the District Court, not reputed, is set forth in Appendix C.

JURISDICTION

The judgment of the District Court of the State of Louisiana was entered October 3, 1973. The judgment of the Supreme Court of the State of Louisiana was entered December 2, 1974. A timely petition for rehearing was denied on January 17, 1975, and is final by its terms. As a result of the judgment of the Louisiana State Supreme Court, the adjudication of this matter in the Louisiana Courts is final, and no further review of the merits of the Federal claims made a part of this petition is available in any Louisiana Court.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Does the holding of this Honorable Court in *Illinois v. Sommerville*, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425, prohibit Louisiana and the other states from employing substantive and procedural law so as to bar retrial of a defendant after declaration of a mistrial as a result of an unconstitutional Grand Jury indictment?

2. When a short-form indictment is employed, and it fails to name the same crime as is named in the Bill of Particulars; if standing alone it fails to provide the defendant with notice of the nature and cause of the accused crime, may the trial judge declare a mistrial without incurring a bar to retrail of the defendant?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions are set forth in Appendix D. They are:

1. United States Constitution V and VI Amendments.

2. Louisiana Code of Criminal Procedure Articles 484, 465.

3. Louisiana Criminal Code, Title 14, Sections 30 and 31.

4. Louisiana Statutes Annotated, Constitution Article I, Section 10.

STATEMENT OF THE CASE

On a bill of indictment presented by the district attorney for the Parish of St. Bernard to a Grand Jury, respondent was accused of first degree murder, in violation of LSA-R.S. 14:30.

The Grand Jury returned a true bill May 22, 1972, read in open Court as follows:

> * * * State of Louisiana versus John Ernest Birabent, Indictment for Murder, a true bill, signed Harry M. Fisher, Foreman of the Grand Jury of St. Bernard Parish, 22nd day of May, 1972. (Appendix B, p. 9a)

The portion of the indictment captioned above was what appeared on the face of the true bill, referred to hereafter as the endorsement. All twelve jurors were present and heard the charge read, "Indictment for Murder," and a statement was made by the jury foreman that at least nine Grand Jurors concurred in finding a true bill.

Ostensibly, at this time neither the judge, grand jurors, prosecutor, or defense counsel was cognizant of the discrepancy between the charge read aloud, and the pertinent body of the true bill which, while not read in open Court, said:

> * * * That one John Ernest Birabent (address) late of the Parish of St. Bernard, on or about the 7th day of May in the year of Our Lord, one thousand, nine hundred seventy-two with force of arms in the said Parish aforesaid, and within the jurisdiction of the Twenty-fifth District Court for the Parish of St. Bernard, *unlawfully killed Thomas Sciortino* . . . (Emphasis added.) (Appendix B, p. 9a)

At arraignment, May 29, 1972, the defendant was charged as follows:

> * * * John Ernest Birabent, on or about the seventh day of May, 1972, unlawfully killed one Thomas Sciortino . . .

and he entered a plea of not guilty (Appendix B, p. 9a). Defendant was later served with a copy of the indictment.

Approximately six months later, defendant requested particulars wherein he made specific reference to the murder statute and requested information about which paragraph or subsection he was charged with having violated. The state answered that he was charged under LSA-R.S. 14:30 (1) which states:

> * * * Murder is the killing of a human being: (1) When the offender has a specific intent to kill or to inflict great bodily harm.

On February 7, 1973 defendant filed a motion for disclosure of alleged similar offenses and conceded that he was charged "with the crime of murder as defined by R.S. 14:30 . . ." (Appendix A, p. 2a.)

When trial began, the entire indictment was read aloud in open Court, and, in compliance with instructions from the trial judge, the clerk read the following:

> * * * John Ernest Birabent was indicted for murder on May 29th, 1972 and the defendant was arraigned and plead not guilty . . . . (Appendix B, p. 11a)

It was not until after defense counsel had concluded his opening statement and the first State witness had been called and questioned that defense counsel pointed out to the Court that the bill of indictment charged the crime of manslaughter and not the crime of murder.

The State argued that if a defect did exist in the indictment, then the judge should permit its amendment

to cure the defect, or, alternatively, that a mistrial should be granted.

The judge denied amendment and granted a mistrial, giving the reasons for this action that the jury had been informed that the trial was for murder. Secondly, he stated that the conflict between the endorsement, which charged murder, and the charging portion of the indictment which charged manslaughter was a defect going to the substance of the charge. Defense counsel objected and reserved a bill of exceptions.

Subsequently, the State filed a motion November 27, 1973 to amend the indictment and to correct it to make it a charge of murder.

Defense counsel objected once more, and applied to the Louisiana Supreme Court for Writs of Certiorari, prohibition and mandamus. The application was denied and the defendant was told he had adequate remedy in the trial court.

When the proceedings resumed in the trial court, defense counsel filed a motion to quash the amended indictment prior to rearraignment, alleging that jeopardy had commenced at the original indictment after the first witness was sworn and had testified. The motion to quash was denied, after which the defense objected to the ruling, and reserved a bill.

Application to the Louisiana Supreme Court to review the ruling was granted and the Court held that the trial judge had declared an illegal mistrial, and that double jeopardy prevented retrial. The Court's

reasons for finding that the mistrial was illegal were that the indictment was a valid manslaughter indictment and that the endorsement did not constitute any portion of the indictment.

The State made a timely petition for rehearing, which was denied January 17, 1975.

REASONS FOR GRANTING THE WRIT

The Louisiana Supreme Court has not followed the holdings of this Honorable Court as to the right of a trial judge to declare a mistrial and not bar retrial under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. In *Illinois v. Sommerville*, 93 S.Ct. 1066, 410 U.S. 458, 35 L.Ed. 2d 425, this Court held:

> * * * A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial.

Sommerville, supra, further held that when reasons exist to declare a mistrial, which are deemed compelling by the trial judge, the mistrial may be declared without the defendant's consent and even over his objection, and the defendant may be retried notwithstanding the Fifth Amendment. *Illinois v. Sommerville*, supra, 93 S.Ct. 1068, citing *Gori v. United States*, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed. 2d 901 (1961).

In assessing the circumstances of the trial below, the Louisiana Supreme Court failed to acknowledge that a fatal substantive defect existed in the trial bill of indictment as it was written by the grand jury, and explained in the Bill of Particulars by the St. Bernard District Attorney.

The defect of the Bill of Indictment is glaring in that it does not meet the requirements of the Sixth Amendment to the Constitution of the United States, held applicable to the states in *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923. The Sixth Amendment provides that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the offense for which he is indicted. *Illinois v. Sommerville*, 410 U.S. 458, 93 S.Ct. 1066.

Russell v. United States addressed the question of what protections an indictment is intended to guarantee by providing criteria to test the sufficiency of an indictment, stating that:

> * * * These criteria are, first, whether the indictment "contains the elements of the offense contended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet," and, secondly . . . "whether the record shows with accuracy to what extent he may plead for acquittal or conviction."

Russell v. United States, 82 S.Ct. 1038, 1047, 369 U.S. 749.

Louisiana does not disparage such rights, as indicated by the Louisiana Constitution, which states:

> * * * In all criminal prosecutions, the accused shall be informed of the nature and cause of the accusation against him . . .

L.S.A. Constitution Article I, Section 10, pertinent portion.

In order that the defendant may be properly informed of the nature and cause of the charged offense, Louisiana employs the short-form indictment procedure, coupled with the guaranteed right of the defendant to be informed of the essential facts constituting the offense with which he is charged. *State v. Clark*, 288 So.2d 612, 616 (La. 1974); *State v. Wright*, 225 So.2d 201 (La. 1969). Furthermore, the Louisiana Supreme Court affords special care to this right when *the offense may be committed in a number of different ways*. *State v. Mann*, 202 So.2d 259, 262 (La. 1967). The defendant's right to a Bill of Particulars is set forth in La. C.Cr.P. Art. 484. (See Appendix D). *State v. Mann*, supra, is especially germane to the instant case, since "unlawful killing" is very non-descript.

In the instant case, the grand jury employed a short-form for manslaughter when they constructed the body of the indictment. La. C.Cr.P. Art. 465 authorizes its use, and specifies that the form for manslaughter is, "A.B. unlawfully killed C.A."

This exact short-form was attacked in *State v. Cooper*, 190 So.2d 86, for the reason that the words

"unlawfully killed," referred to no criminal homicide, failing to state the nature of the crime to be either murder, manslaughter, or negligent homicide. The Louisiana Supreme Court upheld the short-form because the endorsement on the indictment charged manslaughter. The Court reasoned that the crime of manslaughter is well known and well-defined historically and by state law. Additionally, the Court stated:

> * * * (T)he indictment makes reference to the title and section of the revised statutes (R.S. 14:31) where the definition of manslaughter may be found. *A fair reading of the whole document makes* it apparent that the accused is charged with manslaughter and not some other killing such as murder or negligent homicide. (Emphasis added.)

In the instant case, such clarification was not forthcoming by the answers contained in the Bill of Particulars. The district attorney answered the defendant's application for particulars, stating that the accused was being charged under Title 14:30 (1), the Louisiana statute defining murder, requiring specific intent to kill or inflict great bodily harm. (See Appendix D, p. 25a) This answer was provided to the defendant about January 1973. (See Appendix B, p. 10a), six months after arraignment.

It should be noted that the crime of unlawfully killing by means of murder is not a statutory crime in Louisiana. Therefore, the State contends that this answer did not specify the nature and cause of the crime

for which the defendant was indicted, because this combination of short-form indictment and answer in the Bill of Particulars does not specify a Louisiana crime. Notwithstanding this contradictory answer, the Louisiana Supreme Court held the indictment was a valid manslaughter indictment. (See Appendix A, p. 3a), stating

> * * * The indictment which formed the basis for relator's prosecution was a perfectly valid indictment for the crime of manslaughter.

In expressing this holding, the Louisiana Supreme Court stated,

> * * * The word "murder" and the alphabetical and numerical statutory designation "1950 L.R.S. 14:30" do not constitute any part of the finding of the grand jury; the endorsement is not a substantive part of the charge. See *State v. Lawrence*, 221 La. 861, 60 So.2d 464 (1952); see also *State v. DeHart*, 109 La. 570, 33 So. 605 (1903).

In reaching back to 1903, the Court ignored its holding to the contrary in *State v. Cooper*, 190 So.2d 86 (1966), discussed earlier, which held that the endorsement and the numbers contained therein did in fact save the nondescript short-form indictment for manslaughter from constitutional defectiveness. Then, as if in passing, the Court by footnote stated:

> * * * Even if the face of the indictment and the back could be read together to charge murder

> (See *State v. Cooper*, 249 La. 654, 190 So.2d 86 (1966)), the indictment would still support a verdict. The defendant would have been in jeopardy for murder. (See Appendix A, p. 6a, footnote 2.)

With all due respect to the Honorable Louisiana Supreme Court, this portion of the opinion is incredible. The Court is in effect stating that if the trial judge had allowed the defendant to be tried for what he was arraigned for, that is "unlawfully killing" the victim, (see Appendix B, p. 9a) then the indictment was a valid one for manslaughter. This being true, notwithstanding that the grand jury endorsement read in open Court stated:

> * * * State of Louisiana versus John Ernest Birabent, Indictment for Murder, a true bill . . . (See Appendix B, p. 9a)

and that the State had answered the defendant's application for particulars by stating that he was being charged under R.S. 14:30(1), the statute defining murder in Louisiana. Thus, the bill of particulars and endorsement accused the defendant of murder; the arraignment accused him of "unlawfully killing." Then, the Court adds as an addendum, that if the trial judge had decided to read the bill of indictment as a single document, then it would have been a valid murder indictment.

The Louisiana Supreme Court did not address itself to the issue of the obvious conflict between the charge named in the bill of particulars — murder — and the

charge contained in the body of the true bill of indictment — manslaughter. The vice in failing to acknowledge the absolute necessity that the bill of particulars name the elements of the same crime that the defendant is charged with in the short-form indictment, is that without the sameness the bill of particulars fails in its purpose. In failing to relate to the exact same crime, the defendant is not instructed as to what specific or general intent to commit the crime must be proven by the State, and his ability to prepare a defense is greatly impaired.

In Louisiana, first degree murder requires a specific intent to kill or to do great bodily harm, while the crime of manslaughter does not require this specific intent. (La. Cr. Code Title 14:30; 14:31.)

Thus, the Louisiana Supreme Court's decision contravenes the Sixth Amendment, and the holdings of this Court in *Russell v. United States*, 82 S.Ct. 1038, 369 U.S. 749; *United States v. Simmons*, 96 U.S. 360, 362 L.Ed. 819.

This principle was eloquently set forth in *United States v. Cruikshank*, 92 U.S. 542, 558, which stated:

> * * * The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause, and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient

> in law to support a conviction, if one should be had. *For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances.* (Emphasis added.)

The Louisiana Supreme Court's decision is incorrect because it holds that an indictment which reads:

> * * * That one John Ernest Birabent (address) late of the Parish of St. Bernard, on or about the 7th day of May in the year of Our Lord, one thousand nine hundred seventy-two with force of arms in the said Parish aforesaid, and within the jurisdiction of the Twenty-fifth District Court, for the Parish of St. Bernard, unlawfully killed Thomas Sciortino . . ., (Emphasis added.) (See Appendix B, p. 9a)

standing alone, satisfies the constitutional requirements of the Sixth Amendment. The indictment fails to withstand constitutional attack because it fails to state the nature and cause of the crime.

Therefore, the trial judge rightfully exercised his discretion in declaring a mistrial because he felt the indictment contained a defect going to the very substance of the charge. (See Appendix B, p. 13a)

The Louisiana Supreme Court ruled incorrectly when it stated that the trial judge committed error in

declaring a mistrial. The ruling was contrary to the United States Supreme Court's rulings in *United States v. Percy*, 9 Wheat 579 (1824); *Gori v. United States*, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961); and *Illinois v. Sommerville*, 93 S.Ct. 1066, 410 U.S. 458, 35 L.Ed.2d 425.

Sommerville, supra, explained under what conditions a trial judge may declare a mistrial, holding:

> * * * A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial. 93 S.Ct. 1066, 1070.

Sommerville, supra, held that when substantive state law provides that an indictment is defective, and procedural state law disallows correction of the defect by amendment, then the trial judge may declare a mistrial. In *Sommerville*, the defect pertained to failure to specify criminal intent.

In the instant case, Title 14, Section 30 and 31 of the La. Cr. Code require that intent be specified as part of the crimes of manslaughter and murder. Thus, a failure to so specify in the short-form indictment, coupled with the bill of particulars renders the indictment defective. La. C.Cr.P. Art. 487, Section B states in part, "After the trial begins, a mistrial shall be ordered on the ground of a defect of substance." (See Appendix A, p. 5a, footnote no. 1.)

The trial judge realized that the short-form indictment which was used to indict the defendant did not mention intent as an element of the crime. He further realized that the bill of particulars referred to murder with specific intent which is not an element of the crime of "unlawfully killing" as it is known to Louisiana, this crime being known as the crime of manslaughter.

Therefore, rather than risking a sure reversal on appeal, the trial judge stopped the trial so that the defendant could be properly indicted.

Such a proper indictment would specify the elements of the crime of manslaughter, with reference to being committed in "sudden passion or heat of blood," or in some other circumstance prescribed by La. Cr. Code Title 14:31 manslaughter. (See Appendix D p. 25a)

Accordingly, we respectfully submit that it was of manifest necessity that the trial judge declare a mistrial and that the decision of the Supreme Court of Louisiana should therefore be reversed.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana

BARBARA RUTLEDGE
Assistant Attorney General
State of Louisiana

Dated
Gretna, Louisiana
April ____, 1975

LEANDER H. PEREZ, JR.
District Attorney
Parish of St. Bernard

GILBERT V. ANDRY, III
Assistant District Attorney
Parish of Plaquemine

ABBOTT J. REEVES
Director
Research and Appeals Division

CERTIFICATE OF SERVICE

I, ABBOTT J. REEVES, ESQ., a member of the Bar of the Supreme Court of the United States, hereby certify that three true copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the State of Louisiana were served on Respondent by mailing copies thereof in duly addressed envelope to Messrs. F. Irvin Dymond and William L. Crull, III, 1228 First National Bank of Commerce Bldg., New Orleans, Louisiana, this ____ day of April, 1975.

ABBOTT J. REEVES